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CONSPIRACY AS A CRIME, AND AS A TORT.

That conspiracy is a substantive or separate crime in English common law does not admit of doubt. The conspirators may plan to commit a number of offenses in carrying out their agreement, but an indictment, which charges them with a conspiracy to commit such several offenses, charges them with but a single crime.[1] "Such confederation or agreement is itself the offense. The unlawful agreement makes the crime, and it is complete the moment the agreement is entered into. Its legal character depends neither upon that which actually follows it, nor upon that which is intended to follow it. It is the same whether its object be accomplished or abandoned. It may be followed by one overt act, or a series; but as an offense, it is complete without them."[2]

This statement does not warrant the inference that the law punishes conspirators for an intention only. In the language of a distinguished judge:[3]

[1] King *v.* Rispal (1762) 1 W. Bl. 368, 3 Burr 1320. In this case, Rispal and two others were indicted for a conspiracy to defame one John Chilton, and to extort money from him, and the indictment alleged that they had extorted money from Chilton, in pursuance of such conspiracy. After conviction, Rispal insisted that the crime laid in the indictment was insufficient to enable the court to give judgment. Lord Mansfield, speaking for himself and Justices Dennison, Foster and Wilmot, said: "The crime laid is an unlawful conspiracy; this whether it be to charge a man with criminal acts, or such only as may affect his reputation is fully sufficient. The several charges in the indictment are not to be considered as distinct and separate counts, but as one and the same united and continued offence, pursued through its stages. And then it is clear, that the whole will amount to an indictable offence, viz., the getting money out of a man by conspiracy to charge him with a false fact." *Accord*, State *v.* Cawood (1830) 2 Stew. (Ala.) 360.

[2] State *v.* Setter (1889) 57 Conn. 461, 18 At. 782, 14 Am. St. Rep. 121, 41 Alb. L. J. 129. *Accord*, Geist *v.* U. S. (1906) 26 App. D. C. 594, 600.

[3] Mr. Justice Willes, in Mulcahy *v.* The Queen (1868) L. R. 3 H. L. 306. The opinion was assented to by all of the judges summoned by the Chancellor, and expressly concurred in by each of the law Lords. The Lord Chancellor Cairns pronounced it "most clear and satisfactory."

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise. * * * The number and the compact give weight and cause danger."

Inasmuch as conspiracy is a crime, apart from any criminal act which the conspirators have in view when forming the confederation, it would seem to follow that it does not merge in any crime perpetrated by the conspirators, while carrying out their agreed scheme. And such is the accepted rule in England,[1] as well as in the most of our jurisdictions.[2] A few courts have held, however, that a conspiracy is not indictable after a felony has been committed in execution of the conspiracy.[3]

DEFINITION OF CRIMINAL CONSPIRACY.

The Commissioners on Criminal Law in England proposed the following definition:

"The crime of conspiracy consists in an agreement by two persons (not being husband and wife), or more than two persons, to commit a crime, or fraudulently or maliciously to injure or prejudice the public or any individual person."[4]

Not unlike this, in any essential particular, is the definition accepted by the Supreme Court of the United States,[5] and by many

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[1] Reg. *v.* Button (1848) 11 Q. B. 929, 12 Jur. 1017, 18 L. J. M C. 19, 3 Cox C. C. 229. During the argument, Lord Denman, C. J. asked, "If indicted for the conspiracy, is the defendant to purge himself by committing a felony?" In the opinion, which he delivered for a unanimous court, he said, in reply to the objection that if the defendants were convicted of conspiracy to steal, and of theft pursuant to the conspiracy, they would be twice punished for the same offense; "This is not so; the two offenses being different in the eye of the law."

[2] State *v.* Setter (1889) 57 Conn. 461, 468, 18 At. 782, 14 Am. St. Rep. 121, 41 Alb. L. J. 129; Graff *v.* People (1904) 208 Ill. 312, 70 N. E. 299; Laura *v.* State (1853) 26 Miss. 174; Johnson *v.* State (1857) 26 N. J. L. (2 Dutch.) 313, 324, aff'd (1861) 29 N. J. L. (5 Dutch.) 453.

[3] Elsey *v.* State (1886) 47 Ark. 572, applying statute Mansf. Dig. sec. 1822; Comm. *v.* Kingsbury (1809) 5 Mass. 106 (But see Comm. *v.* Walker (1871) 108 Mass. 309, 314, which is *contra*).

[4] Seventh Report of the Commissioners on Criminal Law, 1843, p. 89, Art. 2. *Accord*, Reg. *v.* Warburton (1870) L. R. 1 C. C. R. 274, 40 L. J. M. C. 22, 23 L. T. 473, 19 W. R. 165, 11 Cox C. C. 584.

[5] Pettibone *v.* U. S. (1893) 148 U. S. 197, 203, 37 L. Ed. 419, 13 Sup. Ct. 542.

of the State courts[1] and legislatures[2] and stated by the Supreme Court as follows:

"A combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

Some legislatures, however, have limited criminal conspiracy to a confederation to commit a crime, or a few specified kinds of private wrongs.[3]

The general principle on which the crime of conspiracy is founded has been stated as follows:

"The confederation of several persons to effect any injurious object creates such a new and additional power to cause injury, as requires criminal restraint, although none would be necessary were the same things proposed, or even attempted to be done by any person singly. And this principle extends not merely to a confederation to commit a crime, but also to the causing harm or prejudice to the public, or to a private person, although neither that object, nor the use of the proposed means to effect it would constitute a substantive crime."[4]

It will be observed that the principle enunciated above is very far reaching. It is not limited to the forms of conspiracy which were made punishable by the famous Ordinance of Conspirators,[5] and which consisted "in confederacy or alliance for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds."[6] It includes every sort of corrupt combination entered into for the purpose of injuring the public or an individual.[7] And this far reaching principle

[1] State *v.* Murphy (1844) 6 Ala. 765, 769; State *v.* Gannon (1902) 75 Conn. 206, 212, 58 At. 769; Comm. *v.* Hunt (1842) 45 Mass. (4 Met.) 111, 122; State *v.* Buchanan (Md. 1821) 5 Har. & J. 317, 333, 9 Am. Dec. 534; Smith *v.* People (1860) 25 Ill. 9; Comm. *v.* Ward (1891) 92 Ky. 158, 17 S. W. 283; Alderman *v.* People (1857) 4 Mich. 414; State *v.* Pulle (1866) 12 Minn. 164; Morris Run Coal Co. *v.* Barclay Coal Co. (1871) 68 Pa. 173; Ellzey *v.* State (1880) 57 Miss. 827.

[2] Illinois Rev. St. 1903, p. 622, Arts. 45, 46, 46 (a); Iowa Rev. St. 1897, 5059; Maine Rev. St. 1903, p. 944, §§ 19 & 20; Maryland Public Gen'l Laws, Vol. 1, p. 786, Art. 27, § 34; Mississippi Code 1906, § 1084 (7).

[3] Arkansas, Dig. of St. 1904, 1616–1620; California Pen. Code, §§ 182–184; Colorado, Mills Ann. St. §§ 1293–1299, as expounded in Lipschitz *v.* People (1898) 25 Colo. 261, 53 Pac. 1111; Florida Rev. St. 1891, § 2593; Minnesota, Rev. Laws, 1905, §§ 4867, 4868; New York Penal Code, §§ 168–171.

[4] Seventh Report of the Commissioners on Crim. Law in England, 1843. The members of the Commission were, Thomas Starkie, Henry Bellenden Ker, William Wightman, Andrew Amos and David Jardine.

[5] 33 Ed. 1, Stat. 2 (1305).

[6] Wright, Criminal Conspiracies and Agreements, p. 5.

[7] Bishop's New Criminal Law, Vol. 2, 171.

is one of English common law.[1] Even Mr. Wright, who doubts the existence of so broad a doctrine in the early common law, admits that it is an established principle of that law to-day, and that it has gained recognition because of the beneficent results which flow from it.[2]

Conspiracy as a Tort.

If "the confederation of several persons to effect any injurious object creates such a new and additional power to cause injury, as requires criminal restraint, although none would be necessary, were the same things proposed or even attempted to be done by any person singly," it would seem that any one, who is damaged by the unjustifiable exercise of "such new and additional power," should have an action in tort therefor. It would seem, too, that the distinctive feature of such tort is the conspiracy, rather than the species of harm inflicted. This view, however, has not received unanimous assent.[3]

It was rejected by the New York Court of Appeals in a recent decision.[4] The complaint alleged that the defendants conspired to traduce the plaintiff and injure him in his good name and reputation, and lead his intimate acquaintances and business customers to believe that the plaintiff was insane and not capable of attending to his business, and to cause the plaintiff to be imprisoned on a false charge and to wickedly abuse the process of the Supreme

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[1] State *v.* Buchanan (Md. 1821) 5 Har. & J. 317, 9 Am. Dec. 534, containing an exhaustive examination of all the reported cases on the subject, down to that time; State *v.* Cole (1877) 39 N. J. L. (10 Vroom) 324; Comm. *v.* Carlisle (1821) Brightly's Pa. Rep. 36, opinion by Gibson, J.; O'Connell *v.* The Queen (1844) 11 Cl. & F. 155, 233, opinion of Tindal, C. J., and p. 403, opinion of Lord Campbell.

In State *v.* Cole (1877) 39 N. J. L. (10 Vroom) 324, the court declared that it was not a crime for one partner to issue firm notes and use the proceeds for the payment of his private debts, but it was a crime for him and a third person to issue such notes and to so use the proceeds. The added circumstance of the conspiracy "heightened the malfeasance into a punishable crime." Followed in State *v.* Hickling (1879) 41 N. J. L. (12 Vroom) 208, a conspiracy to cause a person to be regarded as a dishonest man and a thief, by slanderously charging him with having stolen a large amount of copper, brass, etc.

[2] Wright, Criminal Conspiracies and Agreements, pp. 9, 48, 49.

[3] It is supported by Chalmers-Hunt, The Law Relating to Trade Unions (1902), Chap. IV; Eddy on Combinations (1901) § 503; Bishop, Non Contract Law (1889), §§ 353-362.

It is rejected by Pollock, The Law of Torts (6th. Ed.), p. 313; Cooley on Torts (1906) Vol. 1, Chap. V. But this author qualifies his rejection by the statement: "It would seem that some cases might be so extraordinary in their facts, as to be exceptions to that general rule."

[4] Green *v.* Davies (1905) 182 N. Y. 499, 75 N. E. 536

Court; that in pursuance of the said conspiracy several of the defendants uttered against the plaintiff several slanders, particularly set forth in the complaint, and in further pursuance of such conspiracy one of the defendants maliciously and fraudulently instituted a suit in the Supreme Court against the plaintiff for a slander alleged to have been uttered by the plaintiff against said defendant; that the plaintiff was arrested and held to bail in said action, which action was thereafter terminated in favor of the plaintiff, the defendant in said action—by which conspiracy and the acts of the defendants thereunder plaintiff suffered damage. The plaintiff also asked judgment for a further sum which he alleged he was compelled to expend in the defense of the action brought against him. To this complaint the defendants demurred on the ground that separate causes of action were improperly joined, to wit: First, a cause of action for slander and one for malicious abuse of legal process; second, a cause of action for slander uttered by one of the appellants with causes of action for slanders uttered by the other defendants. The demurrer was overruled at Special Term, and the interlocutory judgment entered on that decision was affirmed by the Appellate Division by a divided court.

It appears from this statement, that the question raised by the demurrer was substantially the same as that in *King* v. *Rispal*,[1] and *State* v. *Cawood*,[2] cited in a foregoing note; and that the answer given by the Special Term and the Appellate Division was in accordance with that given by Lord Mansfield and his associates in the earlier of the two cases, viz.:

"The several charges are not to be considered as distinct and separate counts, but as one and the same united and continued offense, pursued through its stages."

In the language of the prevailing opinion of the Appellate Division:

"There is but one cause of action alleged, and that is that the plaintiff has been damaged by the united action of all of the defendants in pursuance of an agreement between them to accomplish an illegal purpose."[3]

This answer the Court of Appeals declared to be erroneous, and "opposed to the decisions in this State." *Hutchins* v. *Hutch-*

[1] (1762) 1 Wm. Bl. 368, 3 Burr 1320.
[2] (Ala. 1830) 2 Stew. 360.
[3] Green *v.* Davies (1905) 100 App. Div. 359, 91 N. Y. Supp. 470, following Rourke *v.* Elk Drug Co. (1902) 75 App. Div. 145, 77 N. Y. Supp. 373.

ins[1] and *Brackett* v. *Griswold*[2] were cited as examples of these decisions, and extended quotations from them were presented in support of the doctrine that the gravamen of the civil action on the case for conspiracy is not the conspiracy, but the wrongful acts done pursuant to the conspiracy and the damage.[3]

Undoubtedly, Chief Justice Nelson did assert, in *Hutchins* v. *Hutchins*, that an action on the case for conspiracy as distinguished from a writ of conspiracy (under the Ordinance of 33 Ed. I, already referred to) "could always be brought against one defendant; or if brought against more, one might be found guilty and the rest acquitted," and hence concluded, that "the conspiracy or combination is nothing so far as sustaining the action goes, the foundation of it being the actual damage done to the party." And this assertion and conclusion are approved by Judge Andrews, in *Brackett* v. *Griswold*. In both cases, these statements are mere *dicta*,[4] and it is submitted *erroneous dicta*.

Recovery Against One Conspirator Only. Chief Justice Nelson, in support of his dictum that if an action on the case for conspiracy be brought against two or more persons, "one might be found guilty and the rest acquitted," cites *Saville* v. *Roberts*,[5] *Skinner* v. *Gunton*,[6] and *Jones* v. *Baker*.[7] Neither of these cases is an authority for this broad proposition. The first case was

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[1] (1845) 7 Hill 104.
[2] (1889) 112 N. Y. 454, 20 N. E. 376.
[3] Green *v.* Davies (1905) 182 N. Y. 499, 75 N. E. 536.
[4] Hutchins *v.* Hutchins was decided against the plaintiff on a demurrer to the complaint, on the ground that he "had no interest in the property of which he says he has been deprived by the fraudulent interference of the defendant, beyond a mere naked possibility, an interest which might, indeed, influence his hopes and expectations, but which is altogether too shadowy and evanescent to be dealt with by courts of law." In other words, no legal right of the plaintiff had been invaded, whether by the combined or several acts of the defendants.

In Brackett *v.* Griswold, by the death of some of the original defendants and the discontinuance of the action against others, the action had become one against Griswold alone; and the point seems to have been made that the action under the third or conspiracy count, could not be maintained against Griswold. This was certainly untenable (Rex *v.* Nichols (1744) cited in 13 East 412, and 1 Leach 277 note), and did not call for any decision of the question whether the third count stated a cause of action for a conspiracy. Moreover, the court asserts that the nature of the cause of action was adjudged in Arthur *v.* Griswold (1874) 55 N. Y. 400, to have been one for fraud and deceit by means of false pretences, and then adds, "The allegation and proof of a conspiracy *in an action of this character* is only important to connect a defendant with the transaction and to charge him with the acts and declarations of his co-conspirators."
[5] (1698) 1 Ld. Raym. 374, 12 Mod. 208, I Salk. 13.
[6] (1669) 1 Saund. 228.
[7] (1827) 7 Cowen 445.

brought against a single defendant for what is now known as malicious prosecution, and involved no charge of conspiracy. The *dictum* of Lord Holt to the effect that, in an action on the case for conspiracy, "the damage is the gist of the action," was uttered in answer to the objection, that the pending action would not lie, because there was no conspiracy, and in connection with his holding that "the damage is as great in the present case, as if there had been a conspiracy."[1] But Lord Holt adds:

"If the one be acquitted in a proper action of conspiracy, no judgment can be given against the other."[2]

In the other cases cited by Chief Justice Nelson, the plaintiff alleged a conspiracy between the defendants to injure him by acts which could have been equally harmful if done by either of them singly. He did not allege or prove any facts indicating that the conspiracy created a "new or additional power to do injury"; but, having proved that he had been legally injured by one of the defendants in the form alleged in the complaint, it was decided that he could have judgment against such wrongdoer, notwithstanding he failed to prove the allegation of conspiracy. Neither decision is authority for the broad proposition that in every case of conspiracy, one of the alleged conspirators "might be found guilty and the rest acquitted."

Indeed, the Court of Appeals admits, that there are exceptions to this broad doctrine, although such exceptions are declared to be "more apparent than real."[3] It refers to *Train* v. *Taylor*,[4] as one of these exceptional cases. There, plaintiff alleged that the firm of Kendal Brothers and one Taylor conspired to induce others, including plaintiffs, to sell on credit goods to the firm, by false representations made by Taylor that the firm was worthy of credit, in order that the firm might get the goods without paying for them, sell them and turn over the proceeds to Taylor in payment of debts owing by the firm to him. The court held that this cause of action was clearly an illegal combination between the defendants by which they undertook to defraud third persons for the benefit of Taylor. "This cause of action," said the court, "must be made out, or the plaintiff must fail." He could not recover against one of the defendants unless he established a right

[1] In Salkeld's report of the case no mention is made of the topic of conspiracy.
[2] 1 Ld. Raym. p. 379. To the same effect F. N. B. 115 E.
[3] Green *v.* Davies (1905) 182 N. Y. 499, 75 N. E. 536, 537.
[4] (1889) 51 Hun 215, 4 N. Y. Supp. 492.

to recover against all. But, said the Court of Appeals, although "that case was rightly decided * * * the gravamen of the action was not the conspiracy, but the tort."

Conspiracy the Gist of the Action. It is submitted, with all deference to the learned court, that the last portion of the preceding sentence would have read equally well had it been written "the gravamen of the action was the tort of conspiracy"; and that it would have been far better law. In support of which proposition the following cases may be referred to:

In *Evans* v. *Freeman and James*,[1] the plaintiff sued the defendants to recover damages for an alleged conspiracy between them to induce her by false and fraudulent representations to exchange valuable property of hers for worthless property of defendant Freeman's. The trial court charged the jury that if they found there was no conspiracy, but that either defendant made false representations of material facts in the transaction which resulted in damage to the plaintiff, they could find a verdict against that defendant. Under this charge, the jury found a verdict for $7,273.33, against the defendant Freeman only. This verdict was set aside on appeal, because "the foundation of the action is the unlawful combination," and therefore a verdict could not be sustained against Freeman alone.[2]

For this conclusion the court cited *Collins* v. *Cronin*,[3] in which the assignments of error raised the question, "Can there be a recovery against one only, in an action on the case in the nature of a conspiracy brought against two or more?" It was answered by Justice Paxson in these words:

> "In the case in hand the conspiracy was everything. Without it, the plaintiff had no cause of action, for the plain reason that the acts charged in the declaration were of such a nature that they could not be committed by one defendant alone."[4]

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[1] (1906) 140 Fed. 419.

[2] Holland, J. said, at p. 421, "The false representations of Freeman could not have injured plaintiff, if her attorney (the defendant James) had informed her, but, she says, he, instead, entered into an unlawful agreement to deceive her, and they together did by their joint deceptions, induce her to make the trade."

[3] (1887) 117 Pa. 35, 11 At. 869; approved in Rundell *v.* Kalbfus (1889) 125 Pa. 123, 17 At. 238, and other Pennsylvania cases.

[4] In the following New York cases the acts charged in the complaint were of such a nature that they could not be committed by one defendant alone; Moore *v.* Tracy (1831) 7 Wend. 229, a conspiracy between the firm of W. & A. Moore and Van Valkenburg, that the latter should buy goods of the plaintiff on credit, should turn them over to the Moores, declare himself insolvent and obtain a discharge, under the insolvent act, and thus defraud plaintiff; Place *v.* Minster (1875) 65 N. Y. 89, a

The learned judge distinguished the case from a prior one[1] (in which language had been used, similar to that of Chief Justice Nelson already quoted) on the ground that

"under the facts of that case the combination or conspiracy was nothing. One of the defendants could have traduced the character of the plaintiff as a teacher, as well as a number of them, and if he had done so he was clearly liable in damages for his own act even although the others had no part in it."

This distinction between cases, where the gist of the action is conspiracy and those where it is not, has been carefully and consistently observed by the Pennsylvania courts. Chief Justice Gibson repeatedly distinguished between an action against several persons for defamation, and an action against conspirators who combined to ruin the plaintiff's reputation by defamatory charges. In *Hood* v. *Palm*,[2] he declared that "a conspiracy to defame by spoken words not actionable would be a subject of prosecution by action, by reason of the presumption that injury and damage would be produced by the combination of numbers." In other words, no legal right of a plaintiff is invaded by certain forms of slander uttered by individuals not acting in concert, but a legal right is invaded when those same slanders are uttered pursuant to a conspiracy between two or more persons to destroy his reputation. In *Haldeman* v. *Martin*,[3] another case of conspiracy to slander plaintiff, the same great judge said:

"Where the uttering of the words in which it (the defamatory charge) is made, is not the gist of the action, they need not be set forth. * * * A conspiracy to do an illegal thing is actionable, if injury proceed from it; and where the illegal purpose has been executed, it is false and malicious wherever the motive for the conspiracy to execute it was false and malicious. *Ex vi termini*, a conspiracy to accuse is evidence of its illegality."

The trial court had charged the jury that they must believe that defendants conspired—that they did so for the purpose of defam-

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conspiracy between the firm of Minster & Kohn and one Sherlock, that the latter should buy goods on credit for the plaintiff, go through the form of selling them to Minster & Kohn and then abscond, thus defrauding the plaintiff; Train *v.* Taylor (1889) 51 Hun 215, 4 N. Y. Supp. 492, the substance of the complaint has been stated already.

[1] Laverty *v.* Vanarsdale (1870) 65 Pa. St. 507.

[2] (1848) 8 Pa. St. 237. The slander was that plaintiff had cheated the Franklin Ins. Co. by secreting goods and forcing the Company to pay for them, as having been burned. The tort complained of was not the defamation but the conspiracy.

[3] (1849) 10 Pa. 369, 372.

ing plaintiff, and that they defamed her in pursuance of the conspiracy. This was objected to by the defendants, who also objected to the court's refusal to instruct the jury "that an action would not lie, because the words were not set forth in the *narr.*" Another objection was that the "second count was defective in not laying the words to have been spoken falsely and maliciously." But, on appeal, the judgment was affirmed, on the ground stated in the extract from Chief Justice Gibson's opinion, given above, that the gist of the action was not the slanders uttered by the defendants, but their conspiracy to injure the plaintiff.

The nature of the modern action on the case for conspiracy, as viewed by the Pennsylvania courts, is fully set forth in *Mott* v. *Danforth.*[1] Said Justice Sergeant:

"The action on the case for a conspiracy has in modern times taken the place of the writ of conspiracy, which seems to be considered as antiquated. The instances of these suits in our reports, are not very numerous, but sufficient appears to show that an action on the case lies wherever the plaintiff is aggrieved and damnified by unlawful acts, done by the defendants in pursuance of a combination and conspiracy for that prupose. * * * It would seem that in most of the cases this remedy has been employed for acts in the nature of malicious prosecution, or abuse of legal proceedings,[2] yet I perceive no reason why it should be confined to such cases."

Acts Which are Legally Harmful Only When Done by Conspirators. The New York Court of Appeals, notwithstanding its repudiation of conspiracy as a tort, admits:

"There may be cases where acts committed in pursuance of a combination of a number of persons, to injure a third person are actionable,

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[1] (1837) 6 Watts 304, the conspiracy charged was between plaintiff's debtor, Tarbox, and two other persons, to the effect that Tarbox should make assignments of his property to such persons who were to assist him in getting out of the State and in preventing his property being applied to the payment of plaintiff's just claim. In support of the decision, the court cited Penrod *v.* Mitchell (1822) 8 S. & R. 522, in which Gibson, J. said: "Without doubt, a conspiracy to enable a debtor to elude the process of the law is immoral and pernicious in its consequences to society; but as it is punishable by indictment, there is no reason that the actors in it should receive castigation for what affects the public, in a civil action, whose legitimate object is the redress of a private injury"; same case *sub nom.* Penrod *v.* Morrison (1830) 2 Pen. & W. 126; and Griffith *v.* Ogle (1806) 1 Binn. 172, in which Tilgham, C. J. declared that the conspiracy is the gist of the action.

[2] Cook *v.* Brown (1878) 125 Mass. 503, is a case of this class, and Lord, J. declared that the cause of action was not the abuse of process, nor the false imprisonment or the malicious prosecution but "that the defendants, by concert of action, fraudulently, and by means of false pretenses, induced the plaintiff to leave his home in another state, and to come into this state."

while the same acts if done by a single individual acting without such concert, would not be actionable. Such cases may be termed actions for conspiracy."[1]

Statements to the same effect are frequently found in the decisions of other courts.[2] If these statements are correct, they would seem to justify the conclusion that conspiracy is a substantive or independent tort.

Such conclusion has been distinctly formulated by the Supreme Court of Wisconsin.[3] The case just noted was brought by the guardian of an insane wife for damages resulting to her from an alleged unlawful conspiracy between the defendants to alienate the husband's affections, and which had resulted in such alienation and the withdrawal of the husband's *consortium* and support. Prior to the institution of this suit, the wife had been defeated in an action[4] against one of the defendants (the mother-in-law of the plaintiff) for the alienation of this husband's affections, on the

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[1] Green *v.* Davies (1905) 182 N. Y. 499, 505, 75 N. E. 536, 537.

[2] Franklin Union *v.* The People (1906) 220 Ill. 355, 376–377, 77 N. E. 176, 110 Am. Rep. 248; "a combination may amount to a conspiracy although its object be to do an act which, if done by an individual, would not be an unlawful act"; Doremus *v.* Hennessy (1898) 176 Ill. 608, 615, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 68 Am. St. Rep. 203, "a combination by them (the defendants) to induce others not to deal with appellee, or enter into contracts with her, or do any further work for her was an actionable wrong"; Jackson *v.* Stanfield (1893) 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; Walsh *v.* Association of Master Plumbers (1902) 97 Mo. App. 280, 71 S. W. 455, "the agreement between the respondents is an illegal conspiracy and its effect is to inflict a civil wrong upon appellants"; Boutwell *v.* Marr (1899) 71 Vt. 1, 42 At. 607; Gatzow *v.* Buening (1900) 106 Wis. 1, 81 N. W. 1003, "a combination to do an act tending necessarily to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates, and give effect to the purposes of the latter, whether of extortion or mischief, is unlawful * * * and any person whose rights are injured by acts done in the furtherance of such conspiracy, has his action at law for redress in damages"; Arthur *v.* Oakes (1894) 63 Fed. 310, 24 U. S. App. 239, 11 C. C. A. 209, 25 L. R. A. 414, "It is one thing for a single individual, or for several individuals each acting upon his own responsibility and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing, in the eye of the law, for many persons to combine or conspire together with the intent, not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public"; Hopkins *v.* Oxley Stave Co. (1897) 83 Fed. 912, 49 U. S. App. 709, 28 C. C. A. 99. "It has been held in several well considered cases that the law will sometimes take cognizance of acts done by a combination, which would not give rise to a cause of action if committed by a single individual, since there is a power in numbers, when acting in concert, to inflict injury, which does not reside in persons acting separately."

[3] Randall *v.* Lonstorf (1905) 126 Wis. 147, 105 N. W. 663, 3 L. R. A. N. S. 470.

[4] Lonstorf *v.* Lonstorf (1903) 118 Wis. 159, 164, 95 N. W. 961.

ground that "to entice away a wife's husband and deprive her of his *consortium* constitutes no injury in the law." The defendants in the conspiracy suit insisted that the complaint therein could not be sustained without overruling the earlier decision. They argued that "as this court has held that no action could be maintained by the wife against a single person for the malicious alienation of the husband's affections, no action could be maintained against a number of persons for the same act done by them in concert." If conspiracy is not a tort by itself, their argument would seem to be unanswerable. If the damage, and not the conspiracy, is the gist of the action, why should it matter whether that damage is inflicted by one person, or by a number of confederated persons? On the other hand, if the corrupt conspiracy of two or more persons to inflict unjustifiable injury upon another is itself unlawful, then it is quite defensible for a court to entertain a civil action for the redress of the injury inflicted pursuant to such conspiracy, "although there may be no redress for the same injury inflicted by a single person." And the Supreme Court of Wisconsin did just this, by overruling defendant's demurrer, and deciding that the plaintiff's complaint stated a cause of action:

> "If," said the court, "the law could not reach and redress such wrongs as are here charged, it would be impotent indeed. No such reproach can be cast upon it. It will not allow conspirators against the marriage bond and the happiness of the family to go 'unwhipt of justice' any more than it will allow conspirators against a business or a profession to escape."

The court cited with approval an earlier Wisconsin case[1] in which it was held that "an executed conspiracy to inflict a malicious injury is actionable," and which defined an actionable conspiracy as "a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object by criminal or unlawful means, or a lawful object by criminal or unlawful means." In the decision last referred to, the court repudiated the doctrine of *Huttley* v. *Simmons*,[2] and cited *Gregory* v. *Brunswick*[3] and *Clifford*

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[1] State ex rel. Durner *v.* Huegin (1901) 110 Wis. 189, 259, 260, 85 N. W. 1046, 62 L. R. A. 700.

[2] L. R. (1898) 1 Q. B. 181, 67 L. J. Q. B. 213. Darling, J. held "that conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff," following Kearney *v.* Lloyd (1887) 26 L. R. Ir. 268. The latter case was distinguished by Andrews, J. (who took part in its decision) in Leathem *v.* Craig (1899) Ir. R. Q. B. 667, as a case where the evidence disclosed no invasion of plaintiff's rights.

[3] (1843) 6 M. & G. 205, 953, 6 Scott N. R. 809, 1 C. & K. 31.

v. *Brandon*,[1] as holding "that preconcerted hissing of an actor for the purpose of injuring him in his profession, was actionable," although such hissing would not "be actionable if perpetrated by one."

Doubt has been expressed by a learned writer,[2] whether *Gregory* v. *Brunswick* really sustains such a proposition. It is submitted that the court which decided the case, evinces no such doubt. Chief Justice Tindal expressly declared[3] that "the charge against the defendants is that they conspired together with others for a certain unlawful purpose," and that the defendants' fourth plea, "which professes to be pleaded in confession and avoidance of part of the cause of action, viz., the hooting, hissing, groaning, shouting and yelling at the plaintiff, and making a noise, outcry and uproar at and against him, does not in fact confess and avoid any part of that which is the gist of the action." Maule, J., told the defendants' counsel that they "should justify the conspiracy."[4] Coltman, J. said:[5]

"When plaintiff's counsel thought proper to rest his case wholly on proof of conspiracy, we think the judge was well warranted in treating the case as one in which, unless the conspiracy was established, there was no ground for saying that the plaintiff was entitled to a verdict. * * * The case proved was, in fact, a case of conspiracy, or it was no case at all on which the jury could properly find a verdict for the plaintiff."

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[1] (1809) 2 Campbell 358, 11 R. R. 731. Sir James Mansfield said: "But if any body of men were to go to a theater with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconceived scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment," although "the audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment."

[2] Sir Frederick Pollock, in 6 COLUMBIA LAW REVIEW 208–9, and 22 Law Quart. Rev. 117.

[3] 6 Scott N. R. at p. 822. The court gave defendants leave to amend, but they declined, and judgment was given against them on the fourth plea. In 6 M. & G. at p. 217, Tindal, C. J. is reported as saying, "The gist of the action is the conspiracy; and the plea justifies only an overt act"; and at p. 958, he said that on the trial of the case he "merely followed that which had been chalked out by the plaintiff's counsel, dealing with the action as one of conspiracy."

[4] 6 Scott N. R. p. 819. Again he said, "The plea applies to and attempts to justify something not charged in the declaration. The charge is that the defendants conspired together with other persons to hoot and hiss the plaintiff, and that they hooted and hissed the plaintiff in consequence of such conspiracy; the justification says nothing about a previous conspiring. You might as well attempt in justification of a libel to separate the nominative case from the verb; they are not more indivisible." *Ibid*, p. 820.

[5] (1844) 6 M. & G. 959, 960.

Gregory v. *Brunswick* has been referred to approvingly by many eminent judges both in England[1] and in this country,[2] and has been treated by them as a classic example of the proper distinction to be made between the non-tortious conduct of a single person and the tortious conduct of a combination.[3]

Acts which are Legally Harmful when Done by Conspirators, Acting Singly. The authorities, cited in the early paragraphs of this article, show that a conspiracy to do acts, which would be criminal if done by the conspirators acting without a combination, is itself a substantive crime. If it is true, that the "essential elements, whether of a criminal or of an actionable conspiracy are the same, though to sustain an action special damage must be proved,"[4] it would seem to follow that we may have the substan-

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[1] Among others by Lord Esher in Temperton *v.* Russell (1893) 1 Q. B. 715, 728; by Bowen, L. J. in Mogul Steamship Co. *v.* Macgregor (1889) 23 Q. B. D. 598, 614; by Andrews, J. in Leathem *v.* Craig (1899) 2 Ir. Rep. Q. B. at p. 679; by Walker, L. J., *ibid*, p. 768; by Holmes, L. J., *ibid*, pp. 774, 776; "It is not illegal, so far as I know, for one person or for several persons to hiss an actor on the stage. But an agreement to attend the theater for the purpose of hissing an actor with a view of interfering with his means of livelihood is a criminal conspiracy; and if the consequence to the individual attacked is the loss of future engagements, he has a right of action against the members of the combination"; and by Lord Macnaghten, in Quinn *v.* Leathem (1901) A. C. at pp. 510, 511, "That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted."

[2] Among others by Chapman, C. J. speaking for a unanimous court in Carew *v.* Rutherford (1870) 106 Mass. 1, at p. 11; "There are cases where an element of the tort is a conspiracy of two or more persons who combine together for the doing of the wrong"; by Gibson, C. J. in Hood *v.* Palm (1848) 8 Pa. 237; by Agnew, J. in Morris Run Coal Co. *v.* Barclay Coal Co. (1871) 68 Pa. 173, 187.

[3] In Moore & Co. *v.* The Bricklayers' Union (1890) 23 Oh. W. L. Bul. 48, 53 (affirmed by the Supreme Court, 31 Oh. W. L. Bul. 208) Taft, J. writing for the unanimous General Term, said, "We are of the opinion that even if acts of the character, and with the intention shown in this case, are not actionable, when done by individuals, they become so when they are the result of combination, because it is clear that the terrorizing of a community by threats of exclusive dealing, in order to deprive one obnoxious member of means of sustenance will become both dangerous and oppressive."

In Quinn *v.* Leathem (1901) A. C. at p. 529, Lord Brampton remarked: "It has often been debated whether, assuming the existence of a conspiracy to do a wrongful and harmful act towards another and to carry it out by a number of overt acts, no one of which taken singly and alone would, if done by one individual acting alone and apart from any conspiracy, constitute a cause of action, such acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy, and if by those acts substantial damage was caused to the person against whom the conspiracy was directed; my own opinion is that they would."

[4] Quinn *v.* Leathem (1901) A. C. 495, at 528–9, opinion of Lord Brampton, citing Barber *v.* Leister (1860) 7 C. B. N. S. 175; Leathem *v.* Craig (1898) Ir. R. Q. B. 667, at 697, opinion of O'Brien, J.; Giblan *v.*

tive tort of conspiracy, even when the acts to be done by the conspirators would be actionable if done by them acting singly; that in such a case, the conspiracy is not a mere matter of aggravation of damages inflicted by the various tortious acts, but is a cause of action by itself.

Such was the view taken by the lower courts, in *Green* v. *Davies*,[1] and repudiated by the Court of Appeals.[2] Such is the established doctrine in several jurisdictions. An example is afforded by a leading Pennsylvania case.[3]

"It was an action on the case in the nature of a writ of conspiracy." The first count alleged that defendants conspired falsely to charge the plaintiff with taking illegal fees and to secure his removal from judicial office for such offense. The second count charged the defendants with conspiracy to accuse the plaintiff before the house of representatives of taking and extorting illegal fees from one Hershberger, and pursuant to such conspiracy procured Hershberger to make an affidavit falsely stating that plaintiff had extorted from him an illegal fee. On the trial, the jury found a verdict for the plaintiff on both counts and assessed damages at six hundred dollars.

The defendants appealed on two principal grounds: "1. That the declaration does not allege that the defendants conspired against the plaintiff without probable cause. 2. That the declaration does not allege that the plaintiff was put to inconvenience, or suffered any loss or damage."

The first objection was based upon the alleged analogy between actions for malicious prosecution and the present action. This analogy was repudiated by the court, which declared that the "action on the case in the nature of a writ of conspiracy has been invented for the ease of plaintiffs, being attended with much less form than the old writ of conspiracy"; and that, under the old writ of conspiracy, it was not necessary to allege that the conspirators acted without probable cause.

Of the second objection the court said:

Nat. Amal. Lab. Union (1903) 2 K. B. 600, at pp. 618–620, opinion of Romer, L. J., and at pp. 621–2, opinion of Sterling, L. J.

Similar views are expressed in Wildee *v.* McKee (1886) 111 Pa. 335, by Sterrett, J. and in Hood *v.* Palm (1848) 8 Pa. St. 237, by Gibson, C. J., and in State ex rel. Durner *v.* Huegin (1901) 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

[1] (1905) 100 App. Div. 359, 91 N. Y. Supp. 470.

[2] (1905) 182 N. Y. 499, 75 N. E. 536.

[3] Griffith *v.* Ogle (1806) 1 Binney 172.

"The old writ of conspiracy charges a conspiracy in the defendants; and that *conspiracy*[1] is the ground of the action. In the present action likewise the conspiracy is the gist of the action, although it may be necessary to show some act in execution of it. The declaration does charge such act; and we are of the opinion that inasmuch as the conspiracy was to accuse the plaintiff of an offense for which he was liable to indictment, and removal from office, the law implies damage."

It will be observed, that if either of the defendants, without a conspiracy, had falsely and maliciously charged the plaintiff with the offense of taking illegal fees, and had corruptly induced Hershberger to make a false affidavit for the purpose of securing plaintiff's removal from office, he would have been guilty of an actionable tort. But neither counsel nor court intimates that such fact affects plaintiff's right of action for the conspiracy.

Another example is afforded by a recent Wisconsin case.[2] Plaintiff sued three defendants for damages caused by the formation and execution of a conspiracy to defraud her of certain real estate. As alleged by the plaintiff and found by the jury, the defendants' conspiracy was substantially as follows:

"That defendant Hulburt should make love to plaintiff, and lead her to believe that he was intent on marrying her; that he should become engaged to marry her; that by means of the influence and control which the marriage engagement would enable said Hulburt to acquire over plaintiff, he should induce her to transfer her property to him without any, or for an inadequate or nominal consideration; that he should then break the engagement and refuse to marry plaintiff; and that, if she should then seek to recover back her property, the defendant should charge plaintiff with unchastity and threaten to expose and disgrace her, and thereby frighten and prevent her from making any attempt to regain her property from said Hulbert."

Here again, either defendant might have defrauded plaintiff of her property. Hence under the doctrine of *Green* v. *Davies*, that "where the conspiracy results in the commission of that which would be an actionable tort whether committed by one or by many, then the cause of action is the tort, and not the conspiracy," the plaintiff's cause of action was not conspiracy but fraud. Such was not the conclusion reached by the Wisconsin court. On the other hand, it declared:

"The gist of this action is the damage suffered by a wrong which was distinct from other wrongs which were in a measure incidental thereto.

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[1] The italics are those of the court.

[2] Patnode *v.* Westenhaver (1902) 114 Wis. 460, 90 N. W. 467.

* * * The cause of action for the conspiracy in such circumstances is a possession by itself, a right to prosecute for the damages caused by the executed fraudulent combination. * * * The right to redress for damages caused by a consummated conspiracy is distinct, so to speak, from the right to redress for wrongs caused in the progress of its execution. It may go against all the members of the combine, and there may be incidental transactions causing damage included in the claim against all, from which causes of action may arise against individual members of the combine. The prosecution of all for the conspiracy may proceed concurrently with the prosecution of one or more members of the combine liable for some element of the damage in another form of action, up to the point of satisfaction, at which point the element satisfied drops out, as there can be but one satisfaction for the same element of damage."

Limits of Conspiracy as a Tort. It is not within the scope of this article to define with any particularity these limits.[1] Its purpose has been to consider whether, within any limits, conspiracy is to rank as a substantive or separate tort. And yet, the fact that conspiracy as a tort is subject to limitations ought not to be ignored in this connection. This fact has been assumed throughout our discussion. Not every combination of persons which inflicts pecuniary harm upon another amounts to an actionable conspiracy. The harm inflicted must have been a "legal injury," and the combination must have been formed and employed to effect an unlawful object or a lawful object by unlawful means.[2]

In determining whether a particular combination has rendered its members liable to a tort action for conspiracy, we may well bear in mind the wise warning of Lord Justice Bowen:[3] "In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public."

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[1] These limits, especially in cases growing out of labor controversies, have been very carefully and exhaustively discussed by Professor Jeremiah Smith, 20 Harvard Law Review, pp. 253 and 345.

[2] Mogul Steamship Co. *v.* McGregor, Gow & Co. (1888) 21 Q. B. D. 544, 549–50, 57 L. J. Q. B. 541, 543, opinion of Coleridge, Ch. J. At a previous stage of this litigation, the Chief Justice had said: "If a conspiracy were proved in point of fact, and the intention of the conspirators were made out to be not the mere honest support and maintenance of the defendants' trade, but the destruction of the plaintiff's trade, and their consequent ruin as merchants, it would be an offense for which an indictment for conspiracy, and if an indictment, then an action for conspiracy, would lie." (1885) 15 Q. B. D. 476, 483, 54 L. J. Q. B. 540.

[3] Mogul Steamship Co. *v.* McGregor, Gow & Co. (1889) 23 Q. B. D. 598, 616, 57 L. J. Q. B. 541.

When, however, it appears that a combination is entered into for the purpose of inflicting unjustifiable legal injury upon another, and does inflict such injury, it is submitted that a civil action for conspiracy should lie. Such a combination "makes oppressive or dangerous that which if it proceeded only from a single person would be otherwise."[1] In other words, such a combination "creates a new and additional power to cause injury."

The recognition of a tort of conspiracy within some such limits as these, has practical advantages. In the first place, it enables the profession to treat "civil and criminal conspiracies to injure as in *pari casu*."[2] A combination between two or more persons to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means, subjects the confederates to a criminal prosecution; and, if injury ensues to an individual therefrom, it subjects them to a civil action by their victim.[3] On the other hand, "no agreement or combination of individuals can constitute a crime, unless the act complained of, when consummated, will deprive some individual, or class of individuals, or the people of some legal right."[4]

In the second place, it tends to diminish rather than to increase litigation. The case of *Green* v. *Davies*[5] well illustrates this. There, the plaintiff would have been able to recover in a single action all damages he had suffered from the wrongful acts of the defendants, if the Court of Appeals had treated the conspiracy of the defendants to do those acts as a substantive tort. By refusing to treat it as a single cause of action, it was forced to sustain the defendants' demurrer, and to compel the plaintiff to institute a separate suit for each tortious act done by the

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[1] *Ibid.* Adopted by Sterling, L. J. in Giblan *v.* Nat. Amal. Lab. Union (1903) 2 K. B. 600, 621.

[2] Chalmers–Hunt, The Law Relating to Trade Unions, p. 114.

[3] In Mogul Steamship Co. *v.* McGregor, Gow & Co. (1888) 21 Q. B. D. at p. 549, Lord Coleridge said: "If the combination is unlawful, then the parties to it commit a misdemeanor, and are offenders against the State; and if, as the result of such an unlawful combination and misdemeanor, a private person receives a private injury, that gives such person a right of private action."

In Quinn *v.* Leathem (1901) A. C. 495, at p. 528, Lord Brampton said: "A conspiracy may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. * * * The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved."

[4] Gage *v.* State (1903) 24 Oh. C. C. R. 724, 727.

[5] (1905) 182 N. Y. 499, 75 N. E. 536.

defendants, or either of them, in carrying out the conspiracy. The learned judges, who were responsible for such a result, appear to have ignored what Mr. Justice Blackburn called "the general principle of convenience which is expressed in the maxim, '*Interest reipublicae ut sit finis litium.*'" [1]

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[1] Brinsmead *v.* Harrison (1872) L. R. 7 C. P. 547, 553, 41 L. J. C. P. 19.